STATE OF MICHIGAN

IN THE SUPREME COURT

LANAH HARRIS, Next Friend of Mariah Bogard-Deitz, William Wesley Deitz and Donld Harris, Jr., minors,

Plaintiff-Appellee,

v.

PAUL RAHMAN, WALTER SAKOWSKI, Personal Representative of the Estate of Richard E. Rahman, Deceased, COUNTY OF WAYNE, BAKER DENTAL DIVISION, ENGLEHARD INDUSTRIES, INC., TROY CHEMICAL COMPANY,

Defendants,

and

HENRY MACIEJEWSKI,

Defendant-Appellant

Supreme Court No: 126922

Court of Appeals No: 247253

WCCC NO. 01-116038 NO

126922
S-Ct

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

CUMMINGS, McCLOREY, DAVIS & ACHO, PLC
BY: **RONALD G. ACHO (P23913)**
ETHAN VINSON (P26608)
JOSEPH NIMAKO (P47313)
33900 Schoolcraft Road
Livonia, MI. 48150
(734) 261-2400

DATED: MAY 12, 2005

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE(S)**

MISCELLANEOUS:

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION WHEN NO REASONABLE JUROR COULD CONCLUDE THAT DEFENDANT'S CONDUCT AMOUNTED TO GROSS NEGLIGENCE THAT WAS "THE" PROXIMATE CAUSE OF THE INJURIES IN THIS CASE?

INTRODUCTION

This case arises out of injuries Plaintiff's children allegedly suffered as a result of elemental mercury that the children spilled in Plaintiff's home.

On August 30, 2004, Defendant, Maciejewski filed an application for leave to appeal the July 22, 2004 judgment of the Court of Appeals affirming the trial court's denial of Defendant's motion for summary disposition based on governmental immunity.

On April 15, 2005, this court entered an Order allowing the parties to file supplemental briefs. (Exhibit A). The Order directed the clerk to schedule oral argument in which the following issues would be addressed:

"1) Can Plaintiff prevail if she did not present documentary evidence that Defendant knew the quantity of mercury involved when he first spoke with Plaintiff on the telephone, or that Defendant's statements directly contradicted the advice of the Poison Control Center?

2) Could a reasonable juror conclude that Defendant's conduct amounted to reckless conduct showing a substantial lack of concern as to whether injury would result?

3) If so, do Defendant's actions constitute "the" proximate cause of the injuries in this case as required by MCL 691.1407(2)(c)?"

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION BASED ON GOVERNMENTAL IMMUNITY.

A. NO REASONABLE JUROR COULD CONCLUDE THAT DEFENDANT'S CONDUCT AMOUNTED TO RECKLESS CONDUCT SHOWING A SUBSTANTIAL LACK OF CONCERN AS TO WHETHER INJURY WOULD RESULT.

The governmental tort liability act, ("GTLA"), MCL 691.1407(2) provides that every officer and employee of a governmental agency is immune from tort liability for injuries the officer or employee causes while engaged in the course of his or her employment.

Subsection (2)(c) however, establishes an exception where the employee's conduct constitutes "gross negligence" that is the proximate cause of the injury or damage. Gross negligence is defined by the GTLA as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results". MCL 691.1407(2)(c).

The issue of whether a governmental employee's conduct constituted gross negligence under MCL 691.1407 is generally a question of fact. However, "if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted. " ***Vermilya v. Dunham,*** 195 Mich App 79, 83; 489 NW2d 496 (1992).

The GTLA takes great pains to protect governmental employees to enable them to enjoy a certain degree of security as they go about performing their jobs. ***Tarlea v. Crabtree,*** 263 Mich App 80, 88; 687 NW2d 333 (2004), Thus, "when no reasonable person could find that a governmental employee's conduct was grossly negligent, our policy favors a court's timely grant of summary disposition to afford that employee the

fullest protection of the GTLA immunity provision . . . ". Id.

This court in ***Maiden v. Rozwood,*** 461 Mich 109; 597 NW2d 817 (1999) addressed the quantum of proof required to survive a motion for summary disposition in gross negligence actions under MCL 691.1407(2)(c). This court noted that the plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent. The court then concluded:

> **[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence**. Rather, the Plaintiff must adduce proof of conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. To hold otherwise would create a jury question premised on something less than the statutory standard. 461 Mich at 122. (Emphasis added).

The Court of Appeals in ***Tarlea,*** **supra,** also explained that "gross negligence . . . suggests . . . almost **a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risk**". 263 Mich App at 90. "It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor **simply did not care about the safety or welfare of those in his charge**." Id. (Emphasis added).

In this case, no reasonable juror could conclude that Defendant exhibited a substantial disregard for the safety of the Plaintiff and her children. The evidence establishes the opposite. To establish gross negligence, a plaintiff must focus on the actions of the defendant, not on the results of those actions. ***Maiden,*** 461 Mich. at 127.

In the instant action, the evidence shows that Ms. Harris first contacted Defendant about the mercury spill in her home on July 2, 1998, several days after the alleged spill.

Defendant recalled what Ms. Harris told him:

> A. Basically the call concerned that her children had found some mercury in the house that she was residing in, that they have spilled - - that they had spilled the mercury. That was basically her statement to me at the time.
>
> Q. And - -
>
> A. I do not believe that amounts were talked about at that time. I do not remember that at all.
>
> Q. Well, that was going to be my next question. Did she indicate to you how much mercury was involved?
>
> A. No. (Appx. H to Defendant's Application for Leave to Appeal, Maciejewski dep., p. 20)

In response, Defendant told Ms. Harris that Wayne County Health Department did not have the equipment to perform this type of investigation and advised her to contact an environmental consulting firm to do the testing and clean-up. Maciejewski testified as follows:

> Q. What did you tell Ms. Harris during this telephone conversation?
>
> A. Basically - - I think I especially explained this previously, but basically that we do not have the equipment to perform this type of an investigation, that I requested that she contact a consulting firm, an environmental consulting firm, that, in fact, they would have the equipment on hand and would be much better, you know, much better off performing the investigation than we would be.
>
> Q. And the equipment is mercury vaporizer you are referring to?
>
> A. The mercury vapor analyzer. It's an analyzer.
>
> Q. And did you give her the name of a consulting company?
>
> A. Yeah. (Maciejewski's dep., p. 21).

Dr. Laurenchuk, Wayne County Medical Director, explained that an outside agency was needed in cases dealing with private dwellings, and they normally refer people to organizations that specialize in mercury testing and clean-up. Moreover, Wayne County is not required to provide such services. They may however, attempt to do some testing under unique situations. Dr. Laurenchuk testified as follows:

> Q. Why did he apparently think that an outside agency might be needed?
>
> A. Well, this was a private dwelling, and normally for matters dealing with private dwellings, we refer people to any of a number of excellent organizations in southeastern Michigan that specialize in mercury testing and clean-up.
>
> * * *
>
> Q. Are there any circumstances under which a call from a citizen might generate the necessity for the county to engage in testing at the particular locale?
>
> A. This is a private dwelling.
>
> Q. Private dwelling. Let's see.
>
> A. Well, in our department we have services that we provide that we are required to provide and then we have services that we provide that we are able to provide that are called allowed services. And so this would fall under the category of an allowed service. **We're not required to provide that service.** But in some unique situations, we may go out to a person's home and we may attempt, you know, to do some testing and etcetera.
>
> Q. And by unique, what do you mean by that?
>
> A. Like what we described earlier, in that if they were maybe unable to afford having a private consulting firm come out and do that testing, if we felt that there was a larger exposure of this private dwelling involved a lot of individuals, hundreds of individuals, were potentially exposed, something that became more than just a private residence type situation. (Appendix to Appellee's Brief, Laurenchuk dep., pp. 20,23-24).

In addition to advising Ms. Harris to contact an environmental consulting firm, Defendant Maciejewski also suggested that she take her children to the Children's Hospital to be tested. (Maciejewski dep., pp. 28).

Ms. Harris re-contacted Defendant two weeks after the first conversation and this time specifically requested Wayne County's help in the testing. Defendant recalled the second conversation as follows:

> Q. So we are clear on this right now, when did the second telephone conversation with Ms. Harris take place?
>
> A. Approximately two weeks later.
>
> * * *
>
> Q. Alright, what did Ms. Harris tell you during this second telephone conversation.
>
> A. In this case, although she did not have - - this is one reason why I'm not too sure whether or not the conversation about Children's Hospital was in the first or second. She re-contacted me concerning the situation. I know in this case, that Children's Hospital was brought up, I just do not remember whether or not it was brought up in the first one. That her children had been there, that they requested that she contact us. **She requested our help in sampling**. I once again explained to her that I was going to have to - - I was going to have to borrow the equipment and that - - and got her name and telephone number. And we told her as soon as I could get my hands on a meter and be sure that it was, you know, that it, you know, that I could have it fully charged, because normally Wayne State does not use these, so therefore, when we get them, they are not charged. So it takes technically they say 18 hours. We try and give it a 24 hour charge. So that, my contacting, in this case, Dr. Peter Warner from our Air Quality Management Division, having him then contact Wayne State, . . . then Dr. Warner picking up the meter, bringing it back to his office, my driving out to Dr. Warner's office, picking it up, I was not very positive about my being able to do this in less than three days. (Maciejewski dep., p. 25-27). (Emphasis added).

After the second conversation, Defendant made efforts to obtain the meter and was in constant touch with Ms. Harris about the meter. (Maciejewski dep., p. 32,42). Defendant eventually obtained a meter from the Wayne State University, charged it and tested Plaintiff's house. Id at 31. He obtained readings that were within the acceptable legal standards. But he suspected that the readings were wrong. Id. at 80-81. He advised the family to get rid of the mattress and couch where the highest readings were obtained. (Maciejewski dep., pp. 76, 85-86). He also advised them to keep the household pets out of the contaminated areas. Id.

At this stage, Defendant did not advise the family to vacate the house because he did not have accurate readings that would indicate that anyone was exposed to some serious risk. (Id. at ap. 53). Defendant however, contacted the EPA and requested their assistance. (Maciejewski dep., p. 110). He also called the City of Dearborn Heights. Shortly thereafter, the City red tagged the house. Id. at 114. According to Ms. Harris, on July 23, the day after the Defendant tested the house, was the family's last day in the house. Id. at 166.

The evidence clearly shows that the Defendant did not exhibit any reckless conduct. When he was informed by Ms. Harris about the mercury spill, Defendant did what department policy requires him to do, i.e. to advise Ms. Harris to contact an environmental consulting firm to deal with the situation. The Wayne County Department did not have the equipment to handle the situation because it was not normally required to do testing or clean-up. The department normally refers people to organizations that specialize in mercury testing and clean-up. (Laurenchuk dep., p. 20). However, under unique situations such as when a person is unable to afford hiring a private consulting

firm to do the testing, the department may step in to offer assistance. But because the department normally does not do this testing, it does not have the equipment and would have to borrow the equipment to do the testing.

When it became clear to the Defendant during his second conversation with Ms. Harris that she could not afford to bring in the environmental consulting firm, Defendant initiated the efforts to obtain a meter from the Wayne State University. Defendant testified that if Ms. Harris had indicated to him earlier that she could not afford hiring an environmental consulting firm to do the testing, he would have acted sooner to obtain the meter. (Maciejewski dep., p. 176). He also requested the assistance of EPA.

Most important, even though Defendant could not obtain accurate readings from the meter when he tested the house, he advised the family to get rid of the mattress and the couch where the highest readings were obtained. Earlier, Defendant had also advised that the children be taken to Children's Hospital for testing.

Thus, Defendant advised Plaintiff to take the necessary precautions and safeguards based on the information he had. His conduct clearly did not show "an almost willful disregard" of the safety of Plaintiff and her children or "a singular disregard for substantial risk". Defendant did not advise the family to vacate the house immediately because he did not have sufficient and accurate information upon which to make a determination that the family faced a substantial risk of harm due to exposure to the mercury.

In order to show that a question of fact existed as to whether Defendant acted in a grossly negligent manner, the Plaintiff was required to present evidence that Defendant simply did not care about Plaintiff's health and safety. ***Tarlea,* supra** at 90. No such

evidence was presented by Plaintiff. Rather, the evidence shows that Defendant performed his duty in a manner that exhibited substantial concern for the health and safety of Plaintiff and her children. One could make the argument that Defendant Maciejewski could have done more to help Plaintiff. However, as the court in ***Tarlea*** aptly stated:

> Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the results. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent. Id at 90.

Based on the evidence, no reasonable juror could conclude that Defendant's conduct amounted to reckless conduct showing a substantial lack of concern as to whether injury would result.

B. THE PLAINTIFF CANNOT PREVAIL IF SHE CANNOT PRESENT DOCUMENTARY EVIDENCE THAT DEFENDANT KNEW THE QUANTITY OF MERCURY INVOLVED WHEN HE FIRST SPOKE WITH PLAINTIFF IN THE TELEPHONE OR THAT DEFENDANT'S STATEMENTS DIRECTLY CONTRADICTED THE ADVICE OF THE POISON CONTROL CENTER.

The Court of Appeals in affirming the trial court's denial of Defendant's motion for summary disposition concluded:

> "Plaintiff presented evidence that . . . defendant knew at the time of the spill at the Harris home that the amount of mercury involved in the spill was an important factor because the greater the spill the greater the danger of vaporization and, therefore, poisoning. . . before the time of the spill at the Harris home, defendant believed that when one pound of elemental mercury was involved in a spill, immediate

> evacuation of the contaminated area was necessary . . . defendant was informed during his first conversation with Lanah Harris that one pound of mercury was involved and that the Poison Control Center had advised the family to evacuate the home. . . not only did defendant not advise the Harris family to evacuate the home, but he directly contradicted the advice given the family by the Poison Control Center in telling them that it was mere speculation that the levels of mercury in the home were dangerous." (Appendix A to Defendant's Application for Leave to Appeal).

If the Court of Appeals' conclusions are true, it would mean that Defendant knew of a substantial risk to the health and safety of Plaintiff and her children due to the amount of mercury involved in the spill. Thus, Plaintiff would arguably have raised a question of fact regarding whether Defendant's conduct amounted to reckless conduct showing a substantial lack of concern as to whether an injury would result. The record, however, does not support the Court of Appeals' conclusions. This court in ***Quinto v. Cross and Peters Co.,*** 451 Mich 358; 547 N.W.2d 314 (1996) described the burden of proof that the parties must satisfy in a motion for summary disposition under MCR 2.116(C)(10).

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting his position by affidavits, depositions, admissions or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed facts exists. Where the burden of proof at trial on a dispositive issue rests on the non-moving party, the non-moving party may not rely on mere allegations or denials in pleading, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. **If the opposing party fails to present documentary evidence establishing the existence of a material dispute, the motion is properly granted**. Id. at 362-363. (Emphasis added)

In this case, Defendant presented documentary evidence that he did not know the quantity of mercury involved. Defendant Maciejewski testified as follows:

Q. Did she indicate to you how much mercury was involved?

A. No. (Maciejewski dep., p. 20).

Plaintiff was then required to present documentary evidence establishing the existence of a material factual dispute regarding whether Defendant knew the quantity of mercury involved. However, Plaintiff presented no documentary evidence that Defendant was informed during the first conversation that one pound of mercury was involved.

Further, the evidence presented by the Plaintiff does not support Plaintiff's claim that Defendant directly contradicted the advice given by Poison Control Center to the Harris family to vacate their house. Ms. Harris testified:

Q. Did you tell [Maciejewski] when you talked to him that the Poison Control had told you to get out of the house?

A. Yeah. I said we waited in the yard. I thought somebody was going to show up here.

Q. What did he say to that?

A. He says well, you really can't be sure about anything until we get a meter in there. I mean, his just - - he would be speculating. (Appendix G to Defendant's Application for Leave to Appeal, Harris dep., pp. 169-170).

Nothing in the Defendant's statements directly contradicted the advice given the family by the Poison Control Center. All that Defendant said was that he was not ready to draw any conclusions until the test was conducted. Defendant never told the Harris family to disregard the advice given them by the Poison Control. Because, Plaintiff could not produce documentary evidence regarding an essential element of her claim, Plaintiff cannot prevail.

C. THE DEFENDANT'S ACTIONS DID NOT CONSTITUTE "THE" PROXIMATE CAUSE OF THE INJURIES IN THIS CASE.

Liability for negligence does not attach unless the Plaintiff establishes that the injury in question was proximately caused by the Defendant's negligence. ***Schutte v. Celotex Corp.,*** 196 Mich App 135, 138; 492 NW2d 773 (1992). Although proximate cause is generally a factual issue to be decided by the trier of fact, the court should rule as a matter of law, if reasonable minds could not differ. ***Berry v J & D Auto,*** 195 Mich App 476, 481; 491 NW2d 585 (1992). The burden of establishing proximate cause always rests with the complaining party, and no presumption of it is created by the mere fact of an accident. ***Howe v Mich. Central Railroad Co.,*** 236 Mich 577; 211 NW 111 (1926).

Pursuant to MCL 691.1407(2)(c) a governmental employee may be liable for grossly negligent conduct if that conduct is "the proximate cause" of the injury or damage. In ***Robinson v City of Detroit,*** 462 Mich 439; 613 NW2d 307 (2000) this Court interpreted the meaning of the phrase "the proximate cause" as used in section 1407(2)(c). The court held that the phrase "proximate cause" is not synonymous with "a proximate cause" and that to impose liability on a governmental employee for gross negligence, the employee's conduct must be the "one most immediate, efficient, and direct cause preceding an injury". The court noted that the Legislature contemplated one cause. The Court stated:

> As to subsection (c), in ***Dedes [v. Asch,*** 446 Mich 99, 107; 521 NW2d 488 (1994)] this court effectively interpreted "the proximate cause" in subsection (c) to mean "a proximate cause." The court further explained that "the" proximate cause does not mean "sole" proximate cause. ***Id.*** We overrule ***Dedes*** to the extent that it interpreted the phrase "the

> proximate cause" in subdivision (c) to mean "a proximate cause." The Legislature's use of the definite article "the" clearly evinces an intent to focus on one cause. **The phrase "the proximate cause" is best understood as meaning the one most immediate, efficient and direct cause preceding an injury**. 462 Mich at 458-459. (Emphasis added).

The Court of Appeals in ***Kruger v White Lake Township,*** 250 Mich. App. 622; 648 N.W.2d 660 (2002), applied the standard in ***Robinson,* supra.** In ***Kruger,*** Plaintiff called the Township police department and requested that her daughter be taken into custody because her daughter was intoxicated and posed a danger to herself and others. The Plaintiff's daughter was transported to the township police department and placed alone in a holding cell where she maneuvered her way out of her handcuffs and escaped. As she fled from the police station, she ran into traffic and was struck and killed by an automobile. The Court of Appeals held that the alleged gross negligence of the police officers was not the proximate cause of the decedent's death. The court stated:

> In the instant case, **there were several other more direct causes of Katherine's injuries than Defendant officers' conduct**, e.g. her escape and flight from the police station, her running onto M-59 and into traffic, and the unidentified driver hitting Plaintiff's decedent. **Any gross negligence on Defendant officers' part is too remote to be "the" proximate cause of Katherine's injuries. As a result, the officers are immune from liability.** Id. at 627. (Emphasis added).

Applying the ***Robinson*** standard to this case, it is clear that Defendant's alleged failure to advise the Harris family to evacuate the home was not "the" proximate cause of the injuries sustained by Plaintiff's children. There were clearly several other more direct causes of the Plaintiff's children's injuries: 1) Richard Rahman keeping a dangerous substance i.e. one pound elemental mercury without a label warning of the danger, in a residential dwelling; 2) Paul Rahman knowing about the existence of the elemental

mercury and its dangerous propensities and failing to warn Plaintiff about them when he rented the house to the Plaintiff; 3) Plaintiff's children spilling the mercury in several areas of the house; 4) the children, Donald Harris, Jr. and Mariah Deitz, putting cigarettes in the mercury and smoking it; 5) the children pouring the mercury on their bodies; and 6) Paul Rahman instructing Plaintiff and her children to pick up the mercury with playing cards exposing them to substantial risk of harm.

Thus, any alleged gross negligence on Defendant's part, even if it was a cause, was but one of several causes and could not be "the" proximate cause of the injuries. The numerous parties Plaintiff named as Defendants in her complaint, attest to this fact. (Appendix C to Defendant's Application for Leave to Appeal, Second Amended Complaint). To be held liable under the GTLA, a defendant's gross negligence must be the most immediate cause of a Plaintiff's injuries - - it is not enough that a defendant's actions simply be "a" proximate cause. ***Tarlea***, **supra** at 92. Based on the evidence, no reasonable juror could conclude that Defendant's conduct was "the one most immediate, efficient and direct cause" of the injuries in this case i.e. the proximate cause..

CONCLUSION

No reasonable juror could conclude that Defendant's conduct amounted to reckless conduct showing a substantial lack of concern for whether an injury would result. Moreover, Defendant's conduct does not meet the test of being "the" proximate cause for the alleged injuries in this case. Therefore, Defendant respectfully requests this Honorable Court to reverse the July 22, 2004 Judgment of the Court of Appeals and enter judgment in favor of Defendant/Appellant.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

By: _____

RONALD G. ACHO (P23913)
ETHAN VINSON (P26608)
JOSEPH NIMAKO (P47313)
33900 Schoolcraft
Livonia, Michigan 48150
(734) 261-2400
Attorney for Defendant/Appellant
Henry Maciejewski

Dated: May 12, 2005